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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 39

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Petitioner,*

vs.

KING PACKING COMPANY, *Respondent.*

Petition of King Packing Company for Rehearing

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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The grounds of this petition are (1) that the Court's decision inadvertently reads out of existence Section 4 of the Portal Act; (2) that the Court's decision disregards the findings of the courts below.

1. The Court's decision inadvertently reads out of existence Section 4 of the Portal Act.

By holding that there is liability for all preliminary activities which are an integral and indispensable part of the principal activities of the employee, the Court has revived

the rule of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L.Ed. 1515 (1946), and wholly frustrated the Portal Act. Section 4 of the Portal Act—enacted for the express purpose of nullifying the *Mt. Clemens* decision—is rendered meaningless.

The *Mt. Clemens* case ruled—as does the present decision—that there is liability for only necessary and indispensable preliminary activities: for "the minimum time necessarily spent" (328 U.S. at 692), for activities "pursued necessarily * * * for the employer's benefit," (*id.* p. 693), and "performed solely on the employer's premises. * * *" (*ibid.*). Thus, in the *Mt. Clemens* case, itself, the Court limited liability for preliminary activities to those that were necessary and indispensable. The Court specifically held that preliminary activities in "sharpening tools" were compensable if necessary and indispensable (*ibid.*).

Nevertheless, Congress enacted the Portal Act—Section 4 as well as Section 2—to ameliorate the employer's liability under this rule. The liabilities created by the *Mt. Clements* decision, "immense in amount and retroactive in operation", stressed by the *Steiner* opinion (p. 6)[1] as the basis for the Portal Act, were expressly found by Congress to have arisen because the Fair Labor Standards Act had "been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees. * * *" (Portal Act, § 1(a)). This express Congressional resolve to end such interpretations could only be fulfilled by Section 4. Section 4 alone could prevent further such interpretations. It alone—not Section 2—could prevent future judicial interpretations—such as the present ones—in disregard of customs and contracts, which would result in "wholly unexpected liabilities, immense in amount and retro-

1. *Steiner v. Mitchell*, No. 22 Oct. term, 1955 (decided Jan. 30, 1956).

active in operation".[2] Thus Section 4, as well as Section 2, is necessary to fulfill the avowed purposes of the statute. *Cf. Steiner* opinion, p. 6.

Other purposes as expressed in the Congressional findings can only be fulfilled by Section 4, *e.g.*, the purpose to prevent "windfall payments * * * for activities performed by them without * * * any expectation of reward beyond that included in their agreed rates of pay"; to prevent "the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in"; and to prevent interference with "voluntary collective bargaining."

Section 4—enacted to change the rule of the *Mt. Clemens* case—expressly exempts from the minimum wage and overtime compensation requirements of the Act "*any*" activities "preliminary to or postliminary to" the employee's principal activity. Section 4 cannot rationally be limited to "unnecessary preliminary activities." The Court's decisions in the *Steiner* and *King Packing* cases, erasing Section 4, can only operate to create a new "existing emergency resulting from claims which if allowed, in accordance with *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, would create wholly unexpected liabilities, immense in amount and retroactive in operation" for the period subsequent to May 14, 1947, the date of the Portal Act. The purpose of Congress was to eliminate such liabilities; that purpose was not fulfilled by the enactment of Section 2.

Accordingly, the Court's decision is but a challenge to Congress to wipe out the effect of the *King Packing Com-*

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2. The rule of law established by this Court's present decision will of course operate retroactively as a precedent to be followed in suits for back pay, notwithstanding the particular judgment will operate only prospectively. *Cf. Steiner* opinion, p. 2.

pany decision as it sought previously to wipe out the *Mt. Clemens* decision.

2. The Court's decision disregards the findings of the Courts below.

> "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. [citations]." (Mr. Justice Jackson, concurring, in *Tennessee etc. Co. v. Muscoda Local No. 123*, 321 U.S. 590 at 605).

In the *Steiner* case the Court places great emphasis on the circumstance that the two courts below found that the activities in question were an integral and indispensable part of the principal activities (pp. 5-6); yet the Court ignores the concurrent findings of the two courts below in the *King-Packing* case that the sharpening of the employees' own knives is in fact merely preliminary.

The activities for which compensation is claimed in this case illustrate strikingly the desirability that this Court refuse to substitute its own findings for those of the trier of the facts. The finding that an activity is preliminary, rather than the actual performance of the principal activity, is one of fact. Like the finding of agency under the doctrine of *respondeat superior*, it depends uniquely upon all of the circumstances before the trial court.

These activities, in the case at bar, are the care by a journeyman for *his own tools*. True, the possession of a sharp knife is essential to the knifeman in the performance of his work. Yet, in this case the knife is but an extension of the employee's identity as a journeyman knifeman. Similarly, salesmen are often required to own an automobile which must be maintained in a condition suitable for use in their work. Journeyman carpenters are often required to

possess and care for their own tools of the trade. A great deal of work such as the sharpening of one's own knife is performed in industry. The facts upon which the finding of preliminary versus principal activity must be based will run the whole gamut—from the situation in which the employee is required to service and repair a piece of the employer's machinery to the situation in which an office worker refills his fountain pen before office hours. Each case must be evaluated on its own facts.

The findings of the Courts below were that in this factual situation, time spent by a journeyman in sharpening his own knife constitutes preliminary activity. They should be allowed to stand. These findings are not inconsistent with the findings of the Courts below under the different factual situation of the *Steiner* case.

"By long-established customs, practices, and contracts" from 1938 (enactment of the Fair Labor Standards Act) to 1945 (the *Mt. Clemens* decision) indispensable preliminary activities including tool sharpening were not within the overtime compensation requirement of that Act. In 1945, in the *Mt. Clemens* case, that Act was "interpreted judicially" by this Court "in disregard of [those] long-established customs, practices, and contracts." In 1947 Congress enacted the Portal Act to wipe out the rule of the *Mt. Clemens* case, both as to the past (Section 2) and future (Section 4). "By long-established customs, practices, and contracts" between the King Packing Company and the Butchers Union from 1947 (enactment of the Portal Act) to 1956 (the decision herein) indispensable preliminary activities including tool sharpening were not within the overtime requirements of the Fair Labor Standards Act. In 1956 in the decision

herein, that Act was again "interpreted judicially" by this Court "in disregard of [those] long-established customs, practices, and contracts," despite findings of two courts below to the contrary.

A rehearing should be granted.

Dated: February 17, 1956.

Respectfully submitted.

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Willard S. Johnston hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

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